IN THE

Supreme Court of the United States

October Term, 1971
No. 71-5685

Supreme Court, U.S.
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MICHAEL RODAK, JR.,

DAISY JOHNSON, *et al.*,

Petitioners,

vs.

NEW YORK STATE EDUCATION DEPARTMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF TEACHERS WILLIAM H. CLUNE III JOHN E. COONS AND STEPHEN D. SUGARMAN IN SUPPORT OF PETITIONER CHILDREN.

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We present this brief in support of petitioner children with the consent of the parties pursuant to Supreme Court Rule 42.

The opinion below of the United States Court of Appeals for the Second Circuit is reported at 499 F.2d 871 (2d Cir. 1971).

Interest of Amici.

American Federation of Teachers.

The American Federation of Teachers is a voluntary association of education workers, which was founded in 1916. It has more than 275,000 members throughout the United States. The purpose of the organization is to elevate the character and advance the interests of the occupation of teaching and to promote the cause of education in the United States. In furtherance of this purpose, AFT has long worked to insure the adequate and equitable financing of public education throughout the nation. The AFT has worked for more than a half century to provide for equal educational opportunity for all American children. Though the present case challenges only a single aspect of a complicated school financing system for a single state, it raises the applicability of the Equal Protection Clause to state allocation of resources to school children, an issue which has major implications for the financing of public education in every American community, urban, suburban and rural. For all these reasons the American Federation of Teachers joins in presenting this brief.

Individual Amici.

Amici are private disinterested individuals who have been writing and publishing on the problems of discrimination in the distribution of educational resources for a number of years. Their interest is that of scholars concerned that the present issue be resolved in a manner befitting our constitutional system as well as fulfilling the educational aspirations of a free society. Petitioners in this case include children and their parents. This is a class action. Amici present this brief

specifically on behalf of the children petitioners whose interests in some cases may be different from their parents.

Summary of Argument.

Through Sections 701, *et seq.*, of its Education Code, the State of New York has established a system for the provision of class books in its public elementary schools which operates in a particularly invidious manner. The New York public education system is a multi-billion dollar operation; yet some children in some districts are denied functional access to that system because they are denied schoolbooks. For a small cost saving the state is doing great injury. Amici ask this Court squarely to hold that education is part of a child's First Amendment rights of speech and association and that to condition his access to those rights upon the payment of a fee by a third party constitutes a denial of equal protection of the law under the Fourteenth Amendment of the U.S. Constitution.

This brief has two areas of special concern: First, it deals with the need for heightened judicial solitude because of the unique relationship of the class of injured petitioners and the interest at stake. Second, it emphasizes the ways that education is planted on the feet of the constitutionally fundamental rights of speech and association.

ARGUMENT.

Introduction:

Under Either the "Close Scrutiny" Test or the Traditional "Rationality" Test, Petitioner Children Are Denied Equal Protection of the Laws by New York State Statutes Which Permit the Conditioning of Their Receipt of School Books Upon the Payment of a Fee.

Petitioners argue that to condition their access to public school books which are employed as the basic texts for elementary courses upon the payment of a fee gives rise to an invidious discrimination which denies to them the equal protection of the laws. Amici support this position.

While there has been much debate about the reach of the equal protection clause, recent opinions of the Court make clear the analytical process that is to be employed. Mr. Justice Marshall, speaking for the Court in *Dunn v. Blumstein,* 40 U.S. Law Wk. 4269 (March 21, 1972), which strikes down durational residency conditions upon the right to vote, sets out the analysis succinctly: "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Id.* at 4271.

The Court then goes on to say "In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interests affected and the classification involved." *Id.* at 4271. Amici submit that there are essentially two tests; or, better put, a State is held to one of two standards in defending the constitutionality of its challenged law. This point is neatly stated by

Chief Justice Burger in *Bullock v. Carter,* 40 U.S. Law Wk. 4211 (February 24, 1972), which strikes down filing fee conditions on the right of a candidate to enter a primary election: "The threshold question to be resolved is whether the filing fee system should be sustained if it can be shown to have some rational basis or whether it must withstand a more rigid standard of review." *Id.* at 4214. He calls that latter standard the "close scrutiny" test. Mr. Justice Blackmun in *Graham v. Richardson,* 403 U.S. 365 (1971), dealing with the rights of aliens to welfare, uses essentially the same approach, saying "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. . . . But the Court's decisions have established that [certain] classifications . . . are inherently suspect and subject to close judicial scrutiny." *Id.* at 371-372. A number of decisions have phrased the "close scrutiny" test as one in which the State must show that the classification is "necessary to promote a compelling state interest." See *Dunn v. Blumstein,* 40 U.S. Law Wk. at 4272, *Kramer v. Union Free School District,* 395 U.S. 621 (1969), *Williams v. Rhodes,* 393 U.S. 23 (1968).

This case is one which invokes the "close scrutiny" test, calling for the State to justify the challenged classification as necessary to support a compelling interest; in addition, however the State's interests with respect to the challenged discrimination are so weak or unrelated that they cannot be justified even under the more tolerant "rationality" test. Because of Amici's belief in the constitutionally fundamental importance of the interest of the petitioners that is here at stake, we turn in Part I to the "close scrunity" test and analysis. In Part II the application of the "rationality" test and analysis shall be considered.

PART I.

THE CLOSE SCRUTINY TEST IS OFFENDED BECAUSE THE RIGHT ASSERTED IS CONSTITUTIONALLY FUNDAMENTAL, THE CLASSIFICATION IS SUSPECT, AND THE DISCRIMINATION IS UNNECESSARY TO THE STATE'S OBJECTIVE.

After the unanimous opinion in *Bullock v. Carter, supra,* it seems firmly established that poverty may not serve as a barrier to the enjoyment of certain constitutionally fundamental interests. This case may be viewed, then, as one of those in the line including *Griffin v. Illinois,* 351 U.S. 12 (1956); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); and *Bullock v. Carter, supra,* in which petitioners challenged a state rule which imposed a fee upon the exercise of a constitutionally fundamental interest. The interest here at stake is that of children in education; that such interest is constitutionally fundamental is the core of this brief. Before turning to the fundamentality of education, however, Amici wish to emphasize the invidiousness of the fee payment requirement.

A. Conditioning the Access of Children to Classbooks Upon the Payment of a Fee Is a Particularly Invidious Discrimination.

1. The Consequence of Forcing Some Children to Attend School Without Books Is Educationally Disastrous.

Seemingly stating what it thought was obvious, the Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969), observed:

> [The State] . . . could not, for example, reduce expenditures for education by barring indigent children from its schools. *Id.* at p. 633.

It is bitter irony that this is effectively the situation that petitioners face.

Taking a disinterested view of the challenged practice, it is difficult to imagine a more efficient policy for crushing whatever hopes these children have of becoming participating members of this society. Its effects must inevitably resound in ever corner of the child's life and personality—now and in the future. Confining our attention to his school experience two general effects upon the child may be emphasized. First is his failure to master the content of education; the second is the labeling of the child as a person of none or little personal worth. Both the majority below and the defendants concede both effects, but a word or two more is appropriate.

The child's plight must be viewed in the context of complusory education. The fact that school attendance is legally mandatory has powerful bearing on the state's constitutional obligation. It may be that in a purely voluntary system the state would have no duty either to provide educational services or to equalize those it did provide. The element of compulsion, however, changes all that. Compulsory school attendance is a drastic imposition upon the individual's freedom of action and association, a massive system of regimentation justified only by the overriding benefits which education yields both to individual and society; deny those benefits, and the burden on liberty becomes insupportable.

The plain fact is, however, that bookless children are not getting the education which provides the justification for compulsion. They are not learning reading, or, if they are, it is no fault of the school. Further, the

deprivation is here given a sharper edge because other children in the same classroom do have books. This makes the harm more serious than in *Griffin v. Illinois, supra.* There, although the rich could afford trial transcripts while the poor could not, rich and poor were not competing with each other for limited opportunities for jobs or college admission. Hence, a benefit for the rich did not itself hurt the poor. Here, all school children are in competition, a competition that will shape their future roles and participation in society. Under a system which is designed to operate for the benefit of students who have books, the bookless suffer a most onerous handicap. In short, to be bookless is effectively to be excluded from the competition.

Instead, what the bookless children are learning is that the government to which they pledge their allegiance each morning is providing others with education while it provides them with compelled custody and daily humiliation. They are learning that school is the springboard to full personal life in this society—for those other children with the key to the public system. For themselves the experience is a conditioning exercise for the sure-to-fail. This discrimination is so utterly crude it is almost comic in its hyperbolic favoritism for the well born.

2. Children Form a Powerless Class Specially Protected by the Fourteenth Amendment.

Whether a particular child enjoys the intended benefits of public education in Hempstead depends entirely upon his luck. Being enrolled in public school is insufficient; he must also have been born in the right home.

Politics may or may not help him, but clearly there is nothing that he himself can do to help politics along. He must await the beneficence of others, because he bears the "unalterable trait" of childhood. He has neither money nor vote. He is but one of a unique minority which is (we might say) disenfranchised by its very minority. There is some danger that this may be viewed merely as an advocate's effort to be artful with a purely formal and technical point. Children, it may be urged, are "represented" politically by the votes of their parents. However, for two good reasons this answer suffers even more from formalism than does the objection itself.

First, the truth is that a very significant number of children do not have voting parents. This parental failure to vote is a neglect of the child's interest that he is helpless to alter. Second, even the parent who does vote is inevitably subject to many influences that conflict with the educational interests of his children. Every other public program competes with education for voters' (adult) support. It would be quite unrealistic to imagine that, on educational issues, parents vote as would their children if those children were themselves franchised and aware of their self-interest. For both these reasons the proxy suffrage through the parental franchise must necessarily be seriously defective in its representation of petitioners' class.

That defect is a justification for "heightened judicial solitude" by this Court for the plight of the children who now seek its aid. *Graham v. Richardson, supra,* 365 U.S. at 372. Plaintiff-children qualify as one of those "discrete and insular minorities" which are special objects of judicial protection. *United States v.*

Carolene Products, 304 U.S. 144, 155 (1938). The opinion in *Breen v. Kahl,* 296 F. Supp. 702, 708 (W.D. Wis. 1969), well summarizes the predicament of the student:

> . . . students . . . do not vote in school board elections; political redress of their grievances is not open to them; theirs is a situation in which judicial vindication of constitutional protections has been considered particularly appropriate. . . . Cautious counsel to avoid judicial involvement in serious constitutional issues merely because they concern younger people, in my view, is neither prudent, expedient, or just. It is time to broaden the constitutional community by including within its protections younger people whose claim to dignity matches that of their elders. See *In re Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967).

Their utter helplessness has been a source of the common law's tender concern for children from the days of the Yearbooks. See generally Blackstone, *Commentaries* (Jones ed.), Book I, Chs. XVI-XVII, 446-466 (San Francisco, Bancroft-Whitney, 1915). Special rules for the protection of minors formed a significant part of what tradition knew as the "Law of Persons". Today most of these protections have been codified. This is not to suggest that every constitutional claim advanced by or on behalf of a child has special weight, but only that the best interests of children, as courts have identified them, will weigh heavily—even in the constitutional scale. *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Application of President and Directors of Georgetown College,* 331 F.2d 1000, 1008 (D.C. Cir. 1964).

Plaintiff children are not in their present misfortune because they deserve education less: Indeed, as far as the record discloses, each is indistinguishable from his peers. He is a child, merely another part of that natural democracy of children—all poor, all helpless, all dependent upon society. That these children should have been singled out from their peers as they have is but the curious effect of state policy. New York has decided that it will provide quality education to those children who find an adult to sponsor them—and some never find one.

Thus for all pupils the principal benefits of this multi-billion dollar public enterprise depend upon the payment of fees by third parties. Such an apparatus is not merely bizarre; it is a public humiliation and an unmerited badge of inferiority for the child of poor or obdurate parents. In this respect these pupils are in a position strikingly similar to victims of racial or other unjustified discrimination. They are made to suffer by the "unalterable trait" of lineage or childhood. *Lindsey v. Normet*, 40 U.S. Law Wk. 4184, 4189 (February 23, 1972).

B. Education Is a Constitutionally Fundamental Interest.

Petitioners and other amici, no doubt, will deal at length with the vital role of education in our society. Hence, on the general fundamentality of education, we can be very brief. The essence of the argument is this: Education is crucial to both state and individual in a rich variety of ways—social, economic, intellectual, and political. It cannot be dismissed as merely social and economic or as "merely" anything. It is too rich in its implications to be captured in a formula. To appreciate the fundamentality of education it must be viewed in

all its many aspects—intellectual, political, social and economic. This is a theme familiar and congenial to the Court from its long consideration of education in the racial context. In fact it is one of the most common themes in our vast social literature. If there is any activity accepted as fundamental in our society, surely it is education. For a general discussion of the question see *Serrano v. Priest,* 5 Cal.3d 584 at 604-610, 487 P.2d 1241 at 1255-1259; Coons, Clune, and Sugarman, *Private Wealth and Public Education,* (Cambridge, Harvard University Press, 1970) at 364-366, 370-373, 387-393, 397-419.

Amici, here, wish to emphasize but one aspect of education, the aspect which we believe is most significant: This is education's direct tie-in to First Amendment rights of speech and association. We seek to reaffirm education's place among those "rights" and "fundamental interests" which are of peculiar juridical importance because they are essentially intellectual activities (e.g. speech, press, thought) and/or political activities (e.g. voting and association) and thus, in either case, are ". . . vital to the maintenance of democratic institutions". *Schneider v. State,* 308 U.S. 147, 161 (1939). Of course, any distinction between intellectual and political activities is artificial; the two are indissolubly linked in their crucial role as guardian of a free society. *Shelton v. Tucker,* 364 U.S. 479 (1960). Only a people which steadfastly remains both intellectually and politically "open" retains the capacity for perpetual self-renewal. A society may abide the widest range of social and economic experimentation through legislation without losing the power to reform itself—so long as it rejects efforts by government to encourage permanent intellectual or political classes and orthodoxies.

Hence the Court has viewed its first responsibility to be the protection of the sources of public communication and political participation from government constraint and discrimination.

Within this classic framework the Court has selectively considered the application of the Equal Protection clause to a wide variety of legislative classifications involving many different human needs and activities. While sometimes tolerating the most poignant of merely personal economic deprivations, as in *Dandridge v. Williams,* 397 U.S. 471 (1970), it has held the state to the highest standard of fairness in matters affecting politics and speech. In these areas the Court has been virtually unanimous. Thus in *Williams v. Rhodes, supra,* Mr. Justice Black himself emphasized for the majority that the intertwining speech and political rights there asserted ". . . rank among our most precious freedoms . . .", and for this reason trigger a special burden of justification by the state. And where the First Amendment was implicated in *Cox. v. Louisiana,* 379 U.S. 536 (1965), again it was Justice Black insisting upon the state's duty of neutrality in the provision of opportunities to hear and be heard. "To limit access . . . to some views but not other . . ." is forbidden as an "invidious discrimination". 379 U.S. at 579-580.

Amici argue that education stands squarely planted on the constitutional feet of politics and speech. Education is at once a political activity of the first order and *the* primary influence of the state upon the intellectual life of its citizens. The majority below cites *Dandridge v. Williams, supra,* and asserts that education is a "social and economic" interest. As far as it goes that is quite correct. Education's significance in this respect

could scarcely be denied. However, no matter how important the social and economic effects of education may be and however much these add to its constitutional status, it is chiefly education's political and intellectual character which give it its constitutional fundamental stature.

1. Education as an Aspect of the First Amendment Right to Know.

In some contexts this Court has described education specifically as a right encompassed by the First Amendments guarantee of freedom of speech, tracing the relevant judicial history to the 1920's. Thus in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court states that ". . . By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the states by the force of the First and Fourteenth Amendments". 381 U.S. at 482. In *Tinker v. Des Moines School District,* 393 U.S. 503 (1969), the Court again interpreted *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) and *Meyer v. Nebraska,* 265 U.S. 390 (1923) as based upon the First Amendment and spoke of the rights of students, as students, arising thereunder. 393 U.S. at 506-07. See also *Epperson v. Arkansas,* 393 U.S. 97 (1968).

Technically, it may have been stretching a point for the Court to cite either *Pierce* or *Meyer* as First Amendment cases. Each is, formally speaking, an example of substantive due process, and neither specifically mentions the First Amendment. Nevertheless, the Court is clearly correct in its modern interpretation of these cases, for their very core is the recognition that education's impact upon the personality, intelligence, and loyalties of children raise fundamental issues of free-

dom of the mind. It is not surprising that *Pierce* and *Meyer* show a current vitality uncharacteristic of substantive due process decisions generally.

The ways in which speech and education interpenetrate are diverse, and not all of them are at stake here. For example, here there is no active frustration by the State of a particular attempt to communicate such as that presented in *Tinker v. Des Moines, supra.* What is involved is another aspect of free speech—the right to know and to receive information. That right has been repeatedly declared by this Court. Thus *Sweazy v. New Hampshire,* 354 U.S. 234, 250 (1957), speaks of the right of students ". . . to inquire, to study and to evaluate, to gain new maturity and understanding . . ." and *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) describes the classroom as a unique example of the "marketplace of ideas". Of course, the right to receive information is enjoyed by more than schoolboys, *Stanley v. Georgia,* 394 U.S. 557 (1969), and is sufficiently precious that it moved this Court in *Lamont v. Postmaster General,* 381 U.S. 301 (1965) to the first invalidation in history of a federal statute on First Amendment grounds. The unanimous decision in that case deserves additional attention.

The *Lamont* decision struck down the federal act and regulations which required addressees of "communist political propaganda" to specifically request such mail before it would be delivered by the postal authorities:

> The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell, Thomas,* and *Mur-*

> *dock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. . . . the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. 381 U.S. at 306-07.

In *Lamont* not only was the intended recipient of speech recognized as the locus of the First Amendment right, but the protection of the flow of ideas to him extended even to unsolicited information. *Lamont v. Postmaster General,* 229 F. Supp. 913, 916 (S.D.N.Y. 1964). In this regard a comparison of *Lamont* and the instant case is instructive. New York has created an enormous system for promoting the flow of a very particular set of information and ideas to a very particular set of recipients including the plaintiff children. This flow is invested with such importance by the State that it constrains the intended recipients by law to join the system and attend to its messages. For their part the intended recipients have expressly indicated (if not otherwise, by this very litigation) their strong interest in receiving this information.

In all respects the comparison to *Lamont* favors plaintiff children. Their right to receive the coveted learning is scarcely inferior in status to that enjoyed by the casual addressee of an unsolicited piece of mail. Similarly, a comparison of the relative burdens imposed on speech favors the instant claim. New York has cast upon plaintiff children an "affirmative obligation"—here the acquisition of books—as a precondi-

tion of equal access to the flow of ideas. In *Lamont* the mere requirement that the addressee request the mail was held "an unconstitutional abridgement of the addressee's First Amendment rights" that outcome is all the more justified here where the affirmative obligation cannot even be performed by the very person affected; that is, the child must depend on a third person to provide the key to the information system.

The practical effect of the New York practice is a crushing burden upon the right to know. Plaintiff-children are effectively limited in their employment of the *public* information system by the fee payment requirement. It is no answer to this that the state has no duty to promote the flow of ideas. Having chosen to do so it may not proceed upon the basis of what is essentially a discrimination by wealth and lineage, *Lindsey v. Normet, supra,* at 4189.

The protection of the right here asserted is supported by every consideration which has historically moved this Court in speech cases. Education and speech share the common objective that inquiry and debate in our nation remain informed and vigorous. It is even false to their nature to separate the two by the conjunction; education *is* speech, just as speech is always a form of education. And, if speech be precious, the full measure of judicial concern must likewise focus on those in our schools for whom the message of public education is designed.

2. Education as an Aspect of the First Amendment Rights of Political Expression and Association.

This argument, like the last, deals with education/speech. It differs only in its concentration upon the political side of the petitioner pupils' future life as citizen. It argues the existence of an important relation

between what is happening to that child in the Hempstead schools and what can be expected of him later as a decision maker in a democratic society.

This Court has identified a wide variety of political expression and associational activity specially protected under the First and Fourteenth Amendments. See generally Lockhart, Kamisar, and Choper, *Constitutional Law*, 766-1020 (St. Paul, West, 1967). These "recognized rights" have a common quality—all are designed to protect the citizen's role in the democratic political process by assuring both his access to ideas and his opportunity within the law to associate to promote such ideas as he supports.

This central concept is so well and so long established that the multiplication of precedent would be pointless. Much of it is summarized in the terse expression of the majority in *Whitney v. California*, 274 U.S. 357 (1927).

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. 274 U.S. at 375.

The interest at stake is speech to be sure, but clearly it is more than the mere right to speak. The audience is at least as important as the speaker. Meiklejohn puts it nicely:

> "[I]n . . . political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers . . . [A]s the self-governing community seeks . . . to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails." Meikle-

> john, *Free Speech and its Relation to Self-Government* (1948), reprinted in Lockhart, Kamisar, and Choper, *supra,* at 789.

Thus, the cherished protection is not merely for the speaker or even the particular audience; it is for all of us:

> The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California,* 283 U.S. 359, 369. *New York Times v. Sullivan,* 376 U.S. 254, 269 (1964).

It is the *total system of free political discussion* that is crucial; it is the frustration of the system by government that is forbidden. And if it be the case that public education is indispensable to full and fruitful political intercourse, then the character of its dispensation is a speech issue of grave consequence.

That, of course, is the essence of the proposition here asserted. It is direct and simple: Education is not only important to political intercourse; it is the very gateway to all effective participation. It is that human activity which alone can justify the epistemological assumptions of a political democracy. Without it the constitutional dependence upon popular participation is merely absurd.

Thus when the state provides education it is engaging the child in perhaps his first—and certainly his first organized—political experience. On a mass basis the state deliberately—and properly—affects the character of our political life in two distinct but related ways. First, through prescribed curricula the state largely fixes the major concepts and content of our political discourse. Secondly, and more important, the acquisition of skills and general culture through education powerfully conditions the young citizen's general capacity for effective participation in the life of his society, including government.

The recent opinion in *Serrano v. Priest, supra,* makes much of this political aspect of education:

> At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.
>
> The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. 5 Cal.3d at 608, 487 P.2d at 1258.

This Court has never before been asked to protect the interest in education as part of the rights of speech and political association. Amici believe it expedient for the Court now to do so because of education's unique impact upon the child's development as a citizen. Education is the very foundation of community life, of effective participation in the political process, of the

consensus of shared democratic values. By transmitting the deposit of learning to the young, education enables our pluralistic society to identify itself as a people with a common destiny. As shaper of the child's capacity for civic contribution, education is indistinguishable from and an integral part of the rights of speech and association. When the State discriminates against children in the provision of education, it corrupts the very sources of free discussion and civic virtue.'

Seeing this special role of education helps to correct the view of the majority below concerning the relevance of *Dandridge v. Williams, supra,* and *James v. Valtierra,* 402 U.S. 137 (1971). The basic theme of the majority respecting these cases seems incorporated in a sentence on p. 879:

> [A]lthough education is no doubt an area of fundamental importance, the Supreme Court has made clear its view that in the area of social welfare, the "compelling state interest" theory does not apply even though basic needs may be involved.

This misses the point. Mr. Justice Stewart in *Dandridge* carefully avoided any such sweeping limitation and made quite plain that merely affixing a label such as "social welfare" or "social and economic" will be insufficient to divert the Court's scrutiny:

> . . . [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. 397 U.S. at 484.

If anything is plain in the instant case, it is that the discrimination is not limited to social welfare and that it does affect speech and association—"freedoms guaranteed by the Bill of Rights." Indeed, as argued at length above that specific injury is what the case is all about. (And it is not merely "some disparity"; for the petitioner-children the result is "educationally disastrous".) To speak of the interest here as "social welfare" is to reduce the education of human beings to the level of their stomach. Did the majority below come to suppose that the constitutional relevance of an interest is to be determined merely by its importance to the creature comfort of the individual? They suggest as a reductio ad absurdum:

> Certainly no one would contend that a student's need for textbooks is any more fundamental than such items as food and clothing which are provided through welfare grants. 449 F.2d at 879 (f.n. 11).

But of course that is precisely what we do contend. A child's mind is constitutionally distinguishable from his stomach. *Dandridge* may reject "economic needs of impoverished human beings", as the criterion of fundamentality, 397 U.S. at 485, but this scarcely implies that discrimination respecting development of human intelligence is of the same order. Indeed, *Dandridge* explicitly states the opposite, citing *Shelton v. Tucker, supra,* as an example of a general area in which the Court's intervention would be appropriate. 397 U.S. at 484.

James v. Valtierra, supra, is an inappropriate analogy for a like reason. The interest at stake in that case was housing. One could readily concede the *importance* of that interest to the affected individuals without conceding its constitutional relevance. Conversely its nonfundamentality tells us nothing about the issue here. Housing and welfare both being almost purely economic and social interests, the conclusion of the majority below with respect to education is simply a non sequitur.

C. The Injury to Petitioners Is Not Necessary to Promote Any Compelling State Interest.

The book rental fee requirement must be justified by the most compelling exigencies of government. But the weightiest countervailing state interest here advanced is economy. Such a consideration is quite insufficient to submerge the right asserted. As with the costs of littering imposed upon government by handbill distribution ". . . Any burden imposed upon the . . . authorities . . . results from the constitutional protection of the freedom of speech and press". *Schneider v. State,* 308 U.S. 147-162 (1939).

Rather than further detailing possible state interests here, Amici will postpone that discussion until the "rationality" test is considered in Part II below, for indeed there is not even sufficient and relevant justification for the fee under the traditional equal protection analysis.

PART II.

THE RATIONALITY TEST IS OFFENDED BECAUSE THE BOOK RENTAL FEE REQUIREMENT IS NOT REASONABLY RELATED TO STATE OBJECTIVES.

A. The Rental Fee Requirement Arbitrarily Injures Children Because of the Wealth or Behavior of Their Parents.

The opinion below fails to distinguish relevant subcategories of the class represented by plaintiff pupils. The total class of pupils injured by the challenged state system is composed of all children who—for whatever reason—do not have access to those books required for participation in the courses of study mandated by the state. This larger class may be broken analytically into at least two groups. The first is composed of those children whose parents or guardians would have provided the rental money but for their indigency; it is on these children that Part I of this brief has focused. The second group is composed of those children who are bookless for any other reason, including parental whim or selfishness.

The opinion below treats plaintiffs simply as "indigent children". By this expression the court clearly means that they are the children of indigent parents; it is not the child's own economic status that is thought to be relevant. In most contexts this would be a sensible view; truly speaking all children are poor and the relevant distinction among them is parental wealth. However, in the circumstances of this case this merger of child and parent by the majority below obscures what is an important factor—the separate and independent status of the child's right.

This confusion still would be inoffensive if the plaintiffs here were clearly members of the first group—

those whose parents did not pay the rental fee because of poverty. In that event the interest of child and parent would in truth be functionally indistinguishable. This is not to suggest, however, that the discrimination would be rational.

With respect to this group of children with poor parents, it is clear that the wealth classification should play a distinct role in the application of the traditional or rationality test. This Court has made clear that the very employment of a wealth distinction by the State in its dispensation of benefits and burdens can cast in doubt the rationality of the device. Thus, in *Harper v. Virginia, supra* at 668, the majority stresses that a voter's affluence has no reasonable relation to the purpose of the franchise. And most recently in *Lindsey v. Normet, supra* at 4184, the majority opinion by Mr. Justice White voids a financial burden on appeals in forcible entry and detainer cases for its very irrationality. Citing *Griffin v. Illinois, supra,* and other indigence cases the opinion emphasized the self-defeating function of a state policy which first makes the appeal available and then effectively eliminates it for those who need it most.

Because petitioners are children, the fee requirement is also arbitrary because it hurts those whose parents have the funds yet do not provide the book fee. The point here is that the child's right is independent of the parent. Pupils are not simply extensions of their parents or guardian. The parent may enjoy an area of primacy in the selection of the style and content of education, at least for young children. *Pierce v. Society of Sisters, supra.* Nevertheless, the separate interest of the child is manifest in the limitations imposed on both parental and state power.

The New York state decisions on the parental *duty* to educate exemplify this position. *Shapiro v. Dorin*, 99 N.Y.S. 2d 830 (1950) is typical. In protecting the child from parental neglect of this duty the court remarked:

> Public Education Laws are the outgrowth of social legislation designed to give equality of opportunity to all children in a society dedicated to the democratic ideal. Without equality of opportunity in education there is no equality among the children of our democratic society. This has recently been made clear by the Supreme Court in Sweat v. Painter, 339 U.S. 629, 70 S.Ct. 848; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851. . . . The kind and quality of education our children receive have like bearing upon whether they will in later life be able to take their rightful place in civil society. . . . *Id.* at pp. 834-835.

Shapiro v. Dorin, like most of the reported decisions involves a conflict between the parent and the state over the child. This tends to obscure the independence of the child's own right, making him seem the creature of one or the other. But he is no one's creature. This is confirmed in the many decisions involving custody and other rights respecting children. Here the touchstone is "the interests and welfare of the children." See e.g. *Bunim v. Bunim*, 298 N.Y. 391, 83 N.E.2d 848 (1949). In many states the child's own preference is relevant in custody cases. See e.g. *Smith v. Smith*, 15 Utah 2d 36, 386 P.2d 900 (1963).

This Court has never been faced directly with an explicit conflict between the child on the one hand

and both parent and state on the other. Occasionally, however, it has recognized the separate character of the child's right. One example is *Prince v. Massachusetts, supra.* Here the parent and child were aligned against the state, but the opinion repeatedly notes that the child has rights which he enjoys as his own. Of course, the decision in *Tinker v. Des Moines, supra,* rests entirely upon the students' own right to free speech though it involved no conflict with parental interests. There, as in *In re Gault,* 387 U.S. 1 (1967), the Court gave recognition to the independent constitutional personality of children and students.

The most explicit and highly relevant affirmation of the child's separate right is the recent decision in *Chandler v. South Bend Community School Corporation,* Civil No. 71 S 51 (U.S.D.C., N.D., Indiana) decided August 26, 1971. *Chandler* involved the refusal of parents either to pay certain school fees or to have them excused by a parental statement of indigency. As a consequence of that refusal, plaintiff children were excluded from certain school opportunities. The court held this practice a violation of the children's rights under the Equal Protection clause. The language of the opinion is explicit on the point of the child's status:

> . . . Defendant herein has totally failed to present any reason why the Plaintiff-students should incur sanctions for their parents' failure to pay school fees. The school fee collection procedure as applied to these minor-Plaintiffs, conditions their personal right to an education upon the vagaries of their parents' conduct, an intolerable practice. . . . (Slip opinion, p. 5)

It would be one thing for the state to decide that parents shall have the choice whether children shall attend school. It is quite another to establish a universal compulsory system, define the appropriate experience so as to require books for its enjoyment, and then relegate the provision of books to an independent private decision.

B. The Classification Is Both Inconsistent With State Purposes and Unnecessary.

The first question here is whether the classification of plaintiff children by their parents' wealth or choice bears a "reasonable relationship to any valid state objective". *Lindsey v. Normet, supra.* If such classification either fails to advance the state objective or is "unnecessary to assure" its accomplishment, ". . . the discrimination against the class . . . is arbitrary and irrational . . ." Id. at 4191. It is not enough that the practice advance the objective; the practice must be reasonably "necessary" to that end. If it can be achieved without imposing the burden, the state's insistence upon the classification becomes punitive and irrational. *Carrington v. Rash,* 380 U.S. 89 (1965); *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

In *Lindsey v. Normet, supra,* the state required unsuccessful tenant defendants in forcible entry and detainer actions to post a bond for double rent as a condition of appeal. This Court found the requirement both ". . . unrelated to actual rent accrued or to specific damage sustained by the landlord . . ." and ". . . unnecessary to assure . . . payment of accrued rent . . ." 40 U.S. Law Week at 4191. The irrationality of the double-rent bond was particularly evident in its

effect upon the poor, for it largely frustrated the state's own purpose in providing a system of appeals:

> The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. *Id.*

Let us then put New York to the test. Does its practice promote its own policy? And, if so, is this practice the only reasonable manner in which that policy may be promoted?

First one must identify New York's policy objective respecting the education of primary students. What is its relevant "purpose"? The majority seeks it in the legislative statement which accompanied the challenged §§701. et seq. 449 F.2d at 877. However, this entirely misconceives the issue by fastening upon but one element in a complex system of public education. One might even concede (we do not) that the limited purpose vaguely expressed in that preamble was in fact advanced. This does not render irrelevant the larger purposes held by the legislature for the whole system. If the legislation effectively frustrates those larger purposes, it may fail even though it accomplishes some relatively minor objective. Indeed, it would be difficult to imagine a legislative classification that accomplished literally nothing of its purpose, even if only the saving (or spending) of money.

What is the broader purpose of the New York *system?* The state constitution mandates the following:

> . . . a system of free common schools, wherein all the children of this state may be educated. *N.Y. Const.*, Article XI, Education, § 1.

Other portions of the Education Code, for example those respecting compulsory attendance, flesh out the picture of legislative purpose. See e.g. § 3204, 3205. The most explicit expression of relevant legislative purpose may be § 3209:

> Public welfare officials . . . shall furnish indigent children with suitable . . . books . . . and other necessaries to enable them to attend upon instruction as hereinbefore required by law. (This section is noted here not for its creation of substantive rights but solely as an indication of legislative purpose in design of the system.)

The state courts have frequently interpreted the legislative purpose of these and related code sections. The opinion in *People v. Turner* is often cited:

> The object of a compulsory education law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society. 277 App. Div. 317, 98 N.Y.S. 2d 886, 888 (1950).

In re Myers, 119 N.Y.S.2d 98 (1953), expanded upon the *Turner* language and applied it to a parent who wished to instruct his child at home. Because the mother was qualified and the child ". . . used the books designated for this grade by the Board of Education", the parent was held to be justified. The *purpose* of the legislative scheme was fulfilled.

What then is the relevant state purpose in the light of these provisions and decisions? Amici suggest the following formulation: ***The state's purpose is the maintenance of a system of education to which all children have functional access.***

Measured by this purpose the challenged practice is plainly self-defeating. It excludes from the central experience of the classroom all those who cannot purchase the key. New York has spent billions of dollars to provide a system of free common schools designed to instruct all children and then made certain that that system would fail for the plaintiff pupils. This is a classic example of irrationality.

Suppose, however, that the Court were to focus upon the preamble of §§ 701 et seq. as an expression of the legislative purpose. One would yet be left in impenetrable doubt, for the language of that preamble is extremely vague. While it would promote science etc., it suggests nothing inconsistent with the state constitutional norm of free public education for all. Quite to the contrary, it calls for "more adequate educational opportunities". In any event, these vague sentiments, whatever their tone, could scarcely be substituted for the historic constitutional and legislative objective we have identified. The only reasonable statement of relevant state purpose is that of providing an educational system truly accessible to all children. Again, and obviously, the state here has failed in that effort by effectively excluding plaintiff pupils.

There is, of course, the possibility argued by the state that the purpose of the discrimination here is simply to save money. There is nothing in the preamble of §§ 701 et seq. to suggest this, but amici are willing to assume it. It is, after all, but a truism; the state spends for so many purposes, and beyond that its purpose is not to spend. In any case the point is easily disposed of. This Court has declared the state's objective of economy an inadequate justification for an otherwise unsupportable classification. See e.g.

Graham v. Richardson, supra; Rinaldi v. Yeager, supra; Shapiro v. Thompson, supra.

But this is only the first reason for holding the wealth classification irrational. What is ultimately so exasperating is the pointlessness of this cruelty. Even if one conceded weight to the state's interest in saving resources, that interest becomes irrelevant here where any number of alternatives can be imagined which satisfy that end without singling out helpless children as victims.

In short, the second, equally cogent reason, is the "unnecessary" character of the discrimination. *Lindsey v. Normet, supra.* There exists a variety of methods assuring the state achievement of *all* its purposes without the present discrimination against petitioners by the wealth or choice of their parents.

In evaluating alternatives it should not be overlooked that New York's present assistance to school districts (especially poor districts) is all out of proportion to the cost here at issue. In 1969-70 New York contributed to local school districts more than $600 per pupil on a statewide average. See Report of the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education; Volume 1, Chapter 2 (Albany, 1972). The point is that it is misleading to view the $7.50 here at issue apart from that subvention. New York could have the effect it wishes merely by miniscule budget shifts which are more general in their effect—that is which do not focus upon the poor. What New York in fact has done is to single out these plaintiffs to bear the full weight of its interest in economy. The poor have been selected to support the education of the nonpoor.

If the state still wished to permit charging a book fee, it could, as under the system before the court in *Chandler*, permit parents to submit a statement of inability to pay; *provided*, as in *Chandler*, that failure to do either led to sanctions only against the parents and not the students. If relieving poor parents from the payment were thought too costly, then perhaps a portion of the welfare budget could be diverted to the education budget. Finally, if necessary, the state might reorganize its education program so that it did not depend upon books. The range of alternatives open to the legislature emphasizes the very modest and limited character of the judicial intrusion here requested.

Conclusion.

Petitioner children have been unconstitutionally singled out and denied effective access to public education in New York. The denial of class books to children on whose behalf a fee has not been paid cannot be tolerated. Respondents' interest in saving money is simply insufficient; moreover, amici submit that to save money in this way is false economy of the worst sort. Not only are other public school resources devoted to bookless children substantially wasted; more importantly, the state seems embarked on a course in which it is squandering some of the most precious resources that it has, namely, these petitioner children.

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